Supreme Court, U. S.
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79-1012

No.

In the

Supreme Court of the United States

DECEMBER TERM 1979

DAN LASHMETT,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ~~SUPREME COURT OF ILLINOIS AND THE~~ APPELLATE COURT FOR THE FOURTH DISTRICT OF ILLINOIS

ROBERT G. HECKENKAMP, ESQ.
HECKENKAMP, AND SIMHAUSER, P.C.
522 East Monroe Street
Springfield, Illinois 62701
(217) 528-5627
Attorney for Petitioner

The Schaffer Press, Inc.—(312) 263-6850

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Petitioner respectfully prays that a Writ of Certiorari issue to review the decision and judgment of the Appellate Court for the Fourth Judicial District of the State of Illinois, from which Leave to Appeal was denied by the Supreme Court of Illinois on October 1, 1979.

OPINIONS BELOW

The decision of the Supreme Court of Illinois is appended hereto as Appendix A. It is unreported.

The opinion of the Appellate Court for the Fourth District of the State of Illinois is reported at 71 Ill.App.3d 429 and is appended hereto as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on October 1, 1979. That judgment denied Petition For Leave to Appeal from the decision of the Appellate Court for the Fourth District of the State of Illinois, which reversed the trial court's judgment and opinion quashing a search warrant and suppressing evidence. The appeal from the trial court's order was taken pursuant to Illinois Supreme Court Rule 604(a)(1). Jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1) Whether the Fourth Amendment guarantee against unreasonable search and seizure can apply to a rural farm-yard area in which a citizen may have a reasonable expectation of privacy.

a) Whether a citizen can have a reasonable expectation of privacy in an area extending 100 yards from his farm residence, which is within the same fenced enclosure as the residence and other areas and facilities maintained exclusively for private use, and which is not visible from any surrounding public areas or neighboring property, or whether such area falls per se within the "open-fields" doctrine.

2) Whether Fourth Amendment protection will tolerate an intrusion by an officer in the middle of the night, over a fence, across a field and over another fence, to reach a farm yard enclosure to examine an item of farm machinery, as the informational basis to support the issuance of a search warrant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and the pertinent provisions of Article 1, Section 6 of the Constitution of the State of Illinois, and Supreme Court Rule 604(a)(1) of the State of Illinois (Ill.Rev.Stats. Ch. 110A, Sec. 604) appear in Appendix C hereto.

STATEMENT

Petitioner was the owner of a 160-acre farm in Scott County, Illinois, which was the object of a search warrant issued upon the basis of information obtained when a Sheriff and his deputy went onto said farm in the middle of the night.

It appeared that certain farm implements, including a John Deere tractor, combine and plow, and an Internaowners to the Sheriff of Scott County. After a ground search of the county and other methods of investigation proved fruitless, the Sheriff chartered an airplane to conduct an aerial search. While flying at 2400 feet above Petitioner's farm, he observed the familiar green and yellow of John Deere and red of International farm equipment, which bore a resemblance to, but could not be identified as, the missing equipment, and was otherwise the usual array of farm equipment familiar to the area.

After discussing the matter with the State's Attorney, and concluding that the aerial search did not provide sufficient information to obtain a warrant (as conceded and found in the trial court and concurred in by the Appellate Court), the Sheriff and a deputy, some 14 hours

later, at 2:00 A.M. on April 12, 1978, drove to the public road adjacent to Petitioner's farm, where they parked and climbed over a fence and crept onto the Petitioner's farm. They crossed a field and found a John Deere cornhead in a ravine, but could not find a serial number or other identifying characteristic. They then climbed over the gate of a second fence and entered the enclosure surrounding the area which included the Petitioner's dwelling and other outbuildings. At a point approximately 100 yards from, and within ready view of, Petitioner's dwelling, the officers found a John Deere tractor bearing a VIN plate matching that of a tractor from which parts had been also reported as missing to the Sheriff of a neighboring county. The tractor and the area in which it was located was not within public view, or visible from the surrounding public area, or neighboring property. It was located near the end of a drive-way which connected Petitioner's house with his hog shed, bee hives, other outbuildings, and a private fishing and swimming pond, all of which were within the same enclosure, with no fence, gate or other barriers standing between the house and any of the structures or facilities of this enclosure. Petitioned and his family used the area exclusively for their own, or private, purposes.

Upon the basis of this information, the Sheriff applied for and obtained the search warrant in the early morning hours of April 12, 1978, after leaving his armed deputy to stand guard on the premises.

Petitioner, after being indicted for Theft, filed a Pretrial Motion to Quash the Search Warrant and Suppress the evidence obtained thereunder, on the grounds that his rights under the Fourth Amendment to the Constitution of the United States and Article 1, Section 6 of the Con-

stitution of the State of Illinois had been violated. Upon hearing by the trial court, the warrant was quashed and the evidence suppressed. The facts, as set forth above, were uncontradicted.

The trial court indicated that whether the test of the search was the Defendant's "expectation of privacy" or the "curtilage" exception to the "open-fields" doctrine, the search was unreasonable (Appendix D). On appeal by the State, pursuant to Illinois Supreme Court Rule 604 (a)(1), the Appellate Court held that the "open-fields" doctrine applied and therefore the trial court's finding was contrary to the manifest weight of the evidence.

REASONS FOR GRANTING THE WRIT

The reasoning of the Appellate Court that this case falls within the open-fields doctrine as pronounced by *Hester* v. *U.S.*, 265 U.S. 57, and *Air Pollution Variance Board of the State of Colorado* v. *Western Alfalfa Corporation,* 416 U.S. 851, is based upon a misconception of that doctrine as applied in those cases and is contrary to the decisions of this Court and the U.S. Courts of Appeals dealing with Fourth Amendment rights.

That the open-fields doctrine of *Hester* v. *U.S.,* and *Air Pollution Variance Board of the State of Colorado* v. *Western Alfalfa Corporation,* is still viable is not in question. The question is whether that doctrine overrides the "reasonable-expectation-of-privacy" test as set forth in *Katz* v. *U.S.,* 389 U.S. 347.

In *Hester,* a Prohibition Act case decided in 1924, the revenue agents went toward the house of the defendant's father, where they concealed themselves 50 to 100 yards away and saw Hester come out and hand another a quart bottle. Upon sounding an alarm, the defendant took a gallon jug from a nearby car and ran across his father's land. A pistol fired, Hester dropped the jug, breaking the bottle, but a portion of its contents remained, which was identified as moonshine whiskey (said to be easily recognizable). Defendant asserted that his rights under the Fourth and Fifth Amendments were violated. After disposing of all contentions, the Court had this to say at page 59:

> "The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the 4th Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields."

In *Air Pollution Variance Board of the State of Colorado* v. *Western Alfalfa Corporation,* 416 U.S. 851, it was daylight when an inspector entered the yard of respondent's plant to make a Ringelmann Test, which requires a trained inspector to stand in a position where he has an unobstructed view of the smoke plume, observe the smoke, and rate it according to the opacity scale of the Ringelmann chart. This test is generally sanctioned for use in measuring air pollution. After stating that the inspector had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke—the Court, citing *Hester,* refused to extend the Fourth Amendment to sights seen in "the open fields." The Court went on to say "the field inspector was on respondent's property *but we are not advised that he was on premises from which the public was excluded.*" (Italics ours)

In 1969, the Supreme Court of the State of Illinois recognized the open-fields doctrine of *Hester. People* v. *Kushmer,* 43 Ill.2d 334, involved a violation of a municipal code declaring the storing of certain described articles in a residential zone to be a nuisance. The defendant had accumulated on the unenclosed yard adjacent to his house a number of automobiles and at least four truckloads of auto parts, iron, metal drums and barrels, tires, twigs, lumber and miscellaneous junk. The articles stored on defendant's lot fit the description of those proscribed by the ordinance. The condition of the premises "could be observed from the street, sidewalk, and parti-

cularly from the alley abutting the rear of the property." The Court had this to say at page 338:

> "The condition of the area was exposed to public view and plainly visible from beyond the premises. The officials in entering upon the land merely viewed and photographed a condition already observed by them from public areas. There was no probing into private places and no violation of the appellant's privacy or his home."

No fault is found with these cases nor with application of the principle within the sphere of factual situations matching those involved. However, the undisputed facts of the Petitioner's case are in no way similar. This is not a case where an incident took place on another's farm, or in the presence of law enforcement officers who engaged in a pursuit nor is it a case of an officer going onto a portion of premises open to the public, during daytime hours, nor is it a case of recognizable articles within ready view from a public way or surrounding area.

In the interim between the *Hester* and *Air Pollution Variance Board* cases, *Katz* v. *U.S.*, 389 U.S. 347 was decided. The Court, in that case, at page 351, said:

> "What a person knowingly exposes to the public, even through in his own home or office, is not a subject of Fourth Amendment protection (citing cases) but what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected (citing cases)."

This Court thus rejected any magical formula for the determination of a constitutionally protected area, but with the same brush of the pen held that an open field is not necessarily outside the constitutionally protected area.

Prior to *Katz,* the "curtilage" test was long recognized as defining the area protected within the language of the Fourth Amendment. As then said in *Wattenburg* v. *U.S.,* 388 F.2d 853 (9th Cir. 1968), and quoted in *U.S.* v. *Fluker,* 543 F.2d 709 (9th Cir. 1976):

> "Interpreting *Katz* . . . (I)t seems to us a more appropriate test in determining if a search and seizure adjacent to a house is constitutionally forbidden is whether it constitutes an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public . . . ."

In a pre-*Katz* case where the "curtilage" test was applied, the Court, in *Fullbright* v. *U.S.,* 392 F.2d 432 (10th Cir. 1968), defined curtilage as follows:

> "Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family."

Thus, in dealing with an intrusion upon a person's property, the definition of curtilage is not wholly dissimilar from the definition of the area which a resident seeks to preserve as private.

In another intrusion case, *U.S.* v. *Davis,* 423 F.2d 974 (5th Cir. 1970), the defendant was placed under arrest at his son's home. He bolted and was pursued to his own home, whereupon he turned to face his captors and brandished a pistol. He was met by a fusillade of four shots and disposed of his pistol and surrendered. Later that night, the F.B.I. agent drove to defendant's house to search for the missing pistol, which was discovered in

the yard of defendant's home. The Court said at page 977:

> ". . . where police officers trespass in order to secure the view, we have not hesitated to find a search . . . The decisions have repeatedly stressed and emphasized the concept that the underlying purpose of the Fourth Amendment is to protect and shield citizens from unwarranted intrusions into their private domain. Here we are dealing with a severe invasion of privacy by the intrusion of officers into the cultilage of a private home at nighttime . . . They drove their automobile into the curtilage of his home and proceeded, unannounced, to look for the weapon. It was found immediately, according to the testimony of one officer, because of the reflection of the porch light on the surface of the gun. This was an unconstitutional search in the classic sense."

And, in *U.S.* v. *Holmes,* 521 F.2d 859, (affirmed on en banc rehearing, 537 F.2d 227) (5th Cir. 1976) an officer trespassed to peer into a shed within a curtilage. Citing the *Davis* opinion above, the Court summarily stated at page 869:

> "When a law enforcement agent trespasses solely to unearth evidence of a crime, he has no right to be in the position to have that view.
>
> . . .
>
> "We are not dealing with an accidental sighting from outside the curtilage or from within while on another, lawful purpose. See *Hester,* supra, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898. They entered solely to secure evidence of crime which would support a warrant for a later and thorough search of the area, and they did so with no basis except speculation for believing any illegal activity was there occurring. This action, condemned in *Brock*[1] fares no better here."

[1] *Brock* v. *U.S.*, 223 F.2d 681

As the trial court found, whether the curtilage or reasonable-expectation-of-privacy test is applied, the search was unreasonable and in violation of Petitioner's constitutional rights. Under the evidence of the case, any other finding would have been against the manifest weight. Unquestionably, the area was within the curtilage and it is uncontradicted that the Petitioner enjoyed the privacy of the area, that he surrounded it with the same fenced enclosure as his house and separated it from the public road by still another fence. Under such circumstances he indeed had a reasonable expectation of privacy in the area. The unlawful intrusion or trespass into that area by the Sheriff and his deputy to make their search is likewise not open to question.

CONCLUSION

To accord Petitioner his rights under the Constitution of the United States, a Writ of Certiorari should issue to review the judgment and opinion of the Appellate Court for the Fourth District of the State of Illinois, made final by the denial of leave to appeal to the Supreme Court of the State of Illinois.

Respectfully submitted,

Robert G. Heckenkamp
Heckenkamp and Simhauser, P.C.
522 East Monroe Street
Springfield, Illinois
Attorney for Petitioner

APPENDIX A

ILLINOIS SUPREME COURT
Clell L. Woods, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 1, 1979

Heckenkamp and Simhauser, P.C.
Attorneys at Law
522 East Monroe Street
Springfield, Ill. 62701

No. 52265 — People State of Illinois, respondent, vs. Dan Lashmett, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

SUPREME COURT, STATE OF ILLINOIS

October 1, 1979

Court Re-Convened at 2:00 P.M.

The following list of cases on the leave to appeal docket, showing disposition thereof, was handed to the clerk:

No. 51714 — . . .
No. 51903 — . . .
No. 51904 — . . .
No. 51916 — . . .
No. 51917 — . . .

No. 51925 — . . .
No. 51926 — . . .
No. 51927 — . . .
No. 51928 — . . .
No. 51929 — . . .
No. 51930 — . . .
No. 52256 — . . .
No. 52257 — . . .
No. 52258 — . . .
No. 52260 — . . .
No. 52261 — . . .
No. 52264 — . . .
No. 52265 — People State of Illinois, respondent, vs. Dan Lashmett, petitioner. Leave to appeal, Appellate Court, Fourth District.

Petition for leave to appeal denied.

No. 52267 — . . .
No. 52268 — . . .
No. 52269 — . . .
No. 52270 — . . .
No. 52271 — . . .
No. 52272 — . . .

APPENDIX B

STATE OF ILLINOIS
Appellate Court
Fourth District

General No. 15192

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

v.

DAN LASHMETT,
Defendant-Appellee.

Agenda No. 79-71

Appeal from Circuit Court Scott County
No. 78-CF-5

Mr. JUSTICE GREEN delivered the opinion of the court:

The State appeals from an order of the circuit court of Scott County granting defendant Dan Lashmett's motions to quash search warrant and to suppress. This appeal raises the question of the constitutionality of an aerial observation of defendant's property and subsequent entry onto defendant's land for the purpose of gathering additional information. Information acquired in this manner was then used to obtain a warrant to search defendant's property.

The complaint for search warrant filed April 12, 1978, by the Scott Company sheriff before a circuit judge of that county stated the following: On March 16 and 18 and April 1, 1978, the Scott County sheriff's office received reports that farm equipment was missing from four different Scott County farms, namely, a John Deere model 4020 diesel farm tractor, a red International 20 foot 6 inch wide folding wing disc, a John Deere semi-mounted plow

and a John Deere model 6600 hillside combine with a 4-row cornhead. The sheriff drove through Scott County looking for the missing machinery and instructed his deputies to do likewise. He also placed notices in county newspapers. On March 22, 1978, he questioned a local resident who stated that on March 10, 1978, he observed a John Deere model 4430 or 4630 farm tractor pulling an International fold-up wing type wheel disc "being the same type disc as reported missing" on a gravel road north of Winchester waiting to cross highway U.S. 36 and that the person driving the tractor was or looked like a person he knew to be the son of Dan Lashmett. The sheriff also interviewed another person who stated that he had observed a John Deere model 4430 farm tractor on the Dan Lashmett farm on Friday afternoon, March 10, 1978, and at other times prior to that date. The complaint recited why the sheriff considered those people to be reliable informants. On April 11, 1978, the sheriff received an offense report from the Pike County sheriff that parts from a John Deere model 4020 diesel farm tractor, including a vehicle identification plate, were missing from that county.

The complaint further stated that on April 11, 1978, the sheriff "chartered an airplane and flew over the entire territory of Scott Count, Illinois in search of equipment matching the general description of the said missing farm machinery." During this flight, he observed on the premises of Lashmett Industries "what appeared to be a red wheel disc similar to the above-described missing wheel disc." He also observed a green tractor he believed to be a John Deere model 4020 or 4010 in an open feedlot on the farm of Dan Lashmett. Also on the Lashmett farm, in places not visible from the public road, he observed a 4-row John Deere cornhead, a large model John Deere combine, a red wheel disc and a semi-mounted plow. After the above-described aerial investigation, the sheriff personally went on Lashmett's property and observed the identification plate on the John Deere model 4020 farm tractor

which bore the same vehicle identification number as the identification plate missing from Pike County.

On the basis of the sheriff's complaint, a warrant to search defendant's farm including lands, feedlots, timbers, fields, and all nonresidence buildings thereon was issued at 7:15 a.m. on April 12, 1978. It authorized seizure of an International wheel disc and the following John Deere machinery: a 4020 diesel farm tractor, 6600 hillside combine, 4-row cornhead, semi-mounted plow, and parts to a 4020 tractor. Pursuant to the warrant, the tractor, disc, plow, combine and cornhead were seized as well as a 3-point John Deere fasthitch and a hood for a John Deere 4020 tractor.

Defendant was then indicted on 6 counts of theft of property with a value over $150, each count charging the theft of a different piece of farm machinery.

Defendant's motion to quash search warrant and motion to suppress alleged that the search and seizure of the above items pursuant to the warrant was illegal and violated his constitutional rights, in part, because information supporting the complaint for search warrant was obtained by an illegal trespass on defendant's land.

The State argues that even if the entry onto defendant's land constituted an illegal search, the aerial observation did not, and that the complaint for search warrant, minus any information obtained by entry onto defendant's land, was sufficient to establish probable cause to issue a search warrant. No Illinois cases involving aerial investigations have been called to our attention, but we do not deem the aerial observation here to have been an illegal search. When the sheriff observed the farm machinery from the airplane, he was in a place where he had a right to be and the machinery was in clear view from that vantage point.

Defendant cites *People* v. *Sneed* (1973), 32 Cal. App. 3d 535, 108 Cal. Rptr. 146, where the California appellate court ruled that an observation from a helicopter of mari-

juana being grown on property rented by defendant was an unconstitutional search. The court noted that the helicopter activity was "manifestly exploratory" in nature and that its position 20-25 feet above the ground was an "obtrusive invasion of privacy" and probably illegal. In dictum, though, the court stated that defendant would certainly have no reasonable expectiation of privacy "from airplanes and helicopters flying at legal and reasonable heights." (32 Cal. App. 535, 542-43, 108 Cal. Reptr. 146, 151.) Here, at the hearing on the motions to quash and to suppress, the sheriff testified without objection that the airplane was flying 2400 feet above the ground.

Assuming, *arguendo,* that the information obtained as a result of the entry onto defendant's land can be separated from the other allegations of the complaint for search warrant (*contra, United States* v. *Nelson* (6th Cir. 1972), 459 F. 2d 884), we do not believe the remaining information was sufficient to support the issuance of a search warrant. Absent the incriminating allegation that the tractor on defendant's property had a vehicle identification plate bearing the same number as a plate reported missing from an adjacent county, the complaint alleged only that the sheriff had observed on defendant's property, an assemblage of farm machinery of the same general type and brand as those reported stolen. The record does not indicate that any of the missing equipment would not be used in normal farming operations and no doubt many farmers in the area owned John Deere and International Harvester implements. Nor do we consider anything unusual or unique about this combination of equipment.

We believe that the information acquired by the sheriff by his entry onto defendant's land was necessary to support the issuance of the search warrant in this case. The constitutionality of the sheriff's actions in obtaining this information presents a much more difficult question.

Without objection, the sheriff and one of his deputies testified that at 2 a.m. on the morning following the aerial

observation, one of the deputies drove the sheriff and Deputy Bryan to the northeast corner of defendant's property which bordered a county road. The sheriff and Bryan climbed or stepped over a fence and walked across defendant's field to a waterway where they saw the cornhead. The sheriff did not know where the serial number was and could not find it. They then walked 100 yards or less to the tractor, crossing another gate or fence in the process. The tractor was located near a hog shed, near the end of a private driveway which ran from defendant's house out to the hog shed, other outbuildings and a private fishing and swimming pond. The entire area was surrounded by a fence and there were no gates or fences between the house and the tractor. Both the sheriff and defendant testified that the tractor was 100 to 125 yards from the house. The sheriff saw that the number on the tractor's vehicle identification plate matched one that had been reported missing from Pike County. They then went back to the squad car and returned to town. The sheriff contacted the State's Attorney and sent the two deputies back to defendant's farm to keep it under surveillance. The sheriff stated that to his knowledge, neither he nor any of the deputies had asked defendant or his family for permission to be on the property.

The State argues that the sheriff's entry onto defendant's land to obtain additional information was permissible under the doctrine of "open fields" first enunciated by Justice Holmes in *Hester* v. *United States* (1924), 265 U. S. 57, 68 L. Ed. 898, 44 S. Ct. 445. There, revenue officers acting on information approached the house where defendant lived. Seeing a man drive up, they concealed themselves and saw defendant come out and hand him a quart bottle. An alarm was given, defendant took a gallon jug from a nearby car, and both men ran. As they did so, they dropped or threw away the containers, which broke. The officers recognized the contents as moonshine whiskey. Outside the house, they also found a broken jar containing whiskey. On appeal, the Supreme Court rejected de-

fendant's argument that failure to exclude the testimony of those officers violated his rights under the Fourth and Fifth Amendments.

> "It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle — and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. * * * The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the *special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields.* The distinction between the latter and the house is as old as the common law." (Emphasis added.) 265 U.S. 57, 58-59, 68 L. Ed. 898, 900, 44 S. Ct. 445, 446.

The "open fields" doctrine was followed in *Martin* v. *United States* (5th Cir. 1946), 155 F. 2d 503, where investigators acting on information hid behind a shack and watched defendants through large cracks in the wall. The defendants left the shack and approached their car which was parked near the porch. When lights from a passing car illuminated the area, one defendant put the jug he had been carrying on the ground under the car. As he walked away, he was placed under arrest. The jug was found to contain tax-unpaid whiskey. Applying the open fields doctrine, the court on appeal ruled that the officer's examination of the jug did not violate the Fourth Amendment because the jug was in an unenclosed area around the shed.

The doctrine was also recited in *Janney* v. *United States* (4th Cir. 1953), 206 F. 2d 601, where revenue agents hid near a hog pen and observed defendant and another man

carry cartons of the type used in the illicit liquor trade from a pickup parked inside a barn to a car just outside. A fence located about 100 yards away from the house separated the agents from the house, the barn and other outbuildings. The court ruled that seizure of the cartons was made incident to a lawful arrest and that the agents' observations as well as other knowledge they already possessed constituted probable cause for the warrantless arrest.

An analogy to the doctrine was discussed in *United States* v. *Romano* (2d Cir. 1964), 330 F. 2d 566, where revenue agents acting on information entered an industrial complex through a hole in the fence and proceeded through a series of unoccupied and unleased buildings until they came to an alleyway where they detected the odor of fermenting mash coming from a nearby building. They then obtained a search warrant on the basis of that information plus information obtained by another agent who stood outside the complex and used binoculars to observe the inside of the building. Although the court upheld the search on the basis that defendants did not have sufficient interest in the ground over which the agents trespassed, the court also noted that the fourth amendment protection does not extend to unoccupied buildings just as it does not extend to open fields.

This state has recognized the doctrine in *City of Decatur* v. *Kushmer* (1969), 43 Ill. 2d 334, 253 N.E.2d 425, where the defendant asserted that city officials unlawfully invaded his land without a search warrant and took photographs of his property. The land in question was a large unenclosed yard adjacent to defendant's house where defendant had accumulated scrap metal, old autos and other junk. The condition of the premises could be observed from the street, sidewalk and an alley at the rear of the property. The court ruled,

> "The activities by the appellee's agents did not constitute a search. 'A search implies a prying into

hidden places for that which is concealed, and it is not a search to observe that which is open to view. A search implies an invasion and quest with some sort of force, either actual or constructive.' (*People* v. *Marvin*, 358 Ill. 426, 428; *People* v. *McCracken*, 30 Ill. 2d 425, 429; *People* v. *Davis*, 33 Ill. 2d 134, 138.) The condition of the area was exposed to public view and plainly visible from beyond the premises. The officials in entering upon the land merely viewed and photographed a condition already observed by them from public areas. There was no probing into private places and no violation of the appellant's privacy or his home. [*Hester, Janney, Martin.*] Further, the fact that the officials may have trespassed by entering the land would not, of itself, transform their viewing into an unreasonable search. [*Hester, Janney, Romano.*] Under the circumstances here we find no infringement of the appellant's constitutional assurance against unreasonable searches and seizures." 43 Ill. 2d 334, 338-39, 253 N.E.2d 425, 428.

Fairly recently, in *Air Pollution Variance Board* v. *Western Alfalfa Corp.* (1974), 416 U.S. 861, 40 L. Ed. 2d 607, 94 S. Ct. 2114, the United States Supreme Court indicated that the "open fields" doctrine still has viability. An inspector for the Colorado Department of Health entered the outdoor premises of respondent without its consent or knowledge in order to conduct a visual pollution test of the smoke emitted from respondent's chimneys. The Supreme Court stated that this was not a violation of respondent's Fourth Amendment rights, that the inspector had sighted plumes of smoke which anyone in the city near the plant could see in the sky. The court ruled that although the inspector was on respondent's property, the court was not advised that he was on premises from which the public was excluded. It ruled that the inspector was well within the "open fields" exception to the Fourth Amendment approved in *Hester*.

Decisions of the Federal Circuit Courts of Appeal, however, have placed some limitations on the doctrine. Beginning with *Rosencrans* v. *United States* (1st Cir. 1966), 356 F. 2d 310, those courts have ruled that the area of a farm protected by the Fourth Amendment includes not only dwelling house but also the "curtilage," *i.e.*, the immediately surrounding area of yards, barns, outbuildings, etc. In *Fullbright* v. *United States* (10th Cir. 1968), 392 F. 2d 432, 435, the court quoted from *Care* v. *United States* (10th Cir. 1956), 231 F. 2d 22, 25, to define the term curtilage as follows:

> "Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family."

In *United States* v. *Davis* (5th Cir. 1970), 423 F. 2d 974, 977-78, the defendant ran when placed under arrest and was pursued to his own home where he brandished a pistol. The officers fired at him, he threw down the pistol and surrendered. Hours after the arrest, an officer returned to defendant's property to search for the pistol and found it in the yard. The district court ruled that the gun had been found "in plain view." The court on appeal reversed ruling that the first consideration is whether the officer had the right to be in a position to have the view. It stated. "The government will not be heard to say that the 'plain view' rule applies where the observing officer has physically invaded a *constitutionally protected* area in order to secure the view." (Emphasis added.)

In *United States* v. *Fluker* (9th Cir. 1976), 543 F. 2d 709, the court was required to determine whether a Federal law requiring its agents to give notice of their authority and purpose and be denied admission before they can break down a door as applied to apartment houses had reference only to the doors of individual apartments or

to the outer door to the building as well. In ruling that it was applicable to the outer door there because the building had only three apartments and the outer door was kept locked with only the landlord and tenants having keys, the court noted that it had held in *Wattenburg* v. *United States* (9th Cir. 1968), 388 F. 2d 853, that the "curtilage" test was no longer applicable in determining the extent of the area protected by the Fourth Amendment. Interpreting *Katz* v. *United States* (1967), 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507, the earlier opinion stated:

> " '[I]t seems to us a more appropriate adjacent test in determining if a search nad seizure adjacent to a house is constitutionally forbidden is whether it constitutes an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public.' " 543 F. 2d 709, 716, quoting 388 F. 2d 853, 857.

In *United States* v. *Holmes* (5th Cir. 1975), 521 F. 2d 859, an officer trespassed to peer into a shed near a farm house. Citing its opinion in *Davis* the court stated:

> "When a law enforcement agent trespasses solely to unearth evidence of a crime, he has no 'right to be in the position to have that view.' " (521 F. 2d 859, 869.)

The court later stated,

> "The government would have us ignore the character of the Moody property. Whatever precautions a homeowner in an urban area might have to take to protect his activity from the senses of a casual passerby, a dweller in a rural area whose property is surrounded by extremely dense growth need not anticipate that government agents will be crawling through the underbrush by putting up signs warning the government to keep away." 521 F. 2d 859,870.

Here, the search of the tractor to determine its serial number took place some 100 to 125 yards from the dwelling house but was near a hog house. In *Hester* the searches and seizures apparently took place just outside a farm house. Unlike in *Kushmer* the land here was enclosed by an outer fence and an inner fence both of which the sheriff had crossed to get to the tractor. Also unlike in *Kushmer* the property could not be seen plainly from adjacent public ways but it could be seen without intrusion upon defendant's land by flying over in a plane at a reasonable and legal height. Of course, the serial numbers on the equipment could not be seen from the air but it is notable that in *Air Pollution Variance Board* the smoke in question was plainly visible from off the defendant's property but the government agent had to go on the property to take the incriminating test of the smoke.

The search of the tractor took place in an area farther removed from the dwelling than the search on any of the rural properties described in *Davis* and *Holmes*. It cannot be said to be adjacent to the home as in *Wattenburg*. Although the tractor was close to a shed, defendant's photographic exhibits indicate that the shed was isolated from the other farm buildings, negating that it was part of the enclosure surrounding the dwelling or "an area used as an adjunct to the domestic economy of the family." Although the sheriff climbed over two fences to get to the tractor, it was not shown that he had been required to sneak through thick underbrush as in *Holmes*. The distance between the shed and the house and the open nature of the land between also negates an expectation of privacy by defendant in the area of the tractor.

The trial court indicated that whether the test of the search was the defendant's expectation of privacy or the curtilage exception to the "open fields" doctrine the search was unreasonable. We disagree.

In *Hester,* the United States Supreme Court considered the farmyard to be an open field. *Hester* has never been

overruled and was cited with approval in *Air Pollution Variance Board.* The opinion in that case stated that the agents actions were "well within the 'open fields' exception to the Fourth Amendment approved in *Hester.*" (416 U. S. 861,865, 94 S. Ct. 2114, ..., 40 L. Ed. 2d 607,611.) The Illinois Supreme Court adopted the "open fields" doctrine in *Kushmer* permitting entry onto a defendant's land to take pictures at closer range than could have been taken from outside the land. The more recent cases of the various circuit courts of appeal cited by defendant are not binding precedent upon us. More importantly, the searches involved in those cases concerned different circumstances. None involved the search taking place as far as 100 yards from the dwelling house in question. No case describing the "open fields" doctrine indicates that it concerns only searches in areas completely isolated from buildings.

We determine the trial court's finding that the instant search was violative of defendant's Fourth Amendment rights to be contrary to the manifest weight of the evidence. The order suppressing the evidence is reversed and the case is remanded to the trial court for further proceedings.

Reversed and remanded.

MILLS and TRAPP, JJ., concur.

APPENDIX C

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV - SEARCH AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V - CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCEES; JUST COMPENSATION FOR PROPERTY.

No person shall be . . . nor be deprived of life, liberty, or property, without due procees of law; . . .

AMENDMENT XIV - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCEES; EQUAL PROTECTION.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due procees of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF ILLINOIS

ARTICLE 1, SECTION 6 - Searches, Seizures, Privacy and Interceptions.

The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

ILLINOIS REVISED STATUTES

Chapter 110A, Section 604.

Appeals from Certain Judgments and Orders.

(a) Appeals by the State.

(1) When State May Appeal. In criminal cases the State may appeal only from an order or judgment the substantive effect of which results in dismissing a charge for any of the grounds enumerated in section 114-1 of the Code of Criminal Procedure of 1963; arresting judgment because of a defective indictment, information or complaint; quashing an arrest or search warrant; or suppressing evidence.

APPENDIX D

(Report of proceedings, Trial Court, pp. 103-108)

The Court: Gentlemen, as you know before I came over here, I had the Clerk forward to me the Motion to Dismiss that had been filed, along with the other pleadings; and I also had an opportunity to do some independent research as to the law, and many of the cases that both counsel cite are the cases that I also read before coming over here. So, I am somewhat familiar with the propositions that both of you have talked about to the Court.

I have now had the further benefit of the testimony that has been adduced in this case, and I think the Court is in a position at this time to render an opinion.

This doctrine that we have been talking about, the doctrine of open fields, and as it was announced in the Hester case, I think we go back to the original doctrine, and I am going to start with that proposition. Or, no, I am going to talk about the proposition you didn't have to argue, Mr. Cherry, and that is the description that Mr. Heckenkamp says is vague and inaccurate and can not stand.

* * * * *

But, getting back to the search warrant itself. The complaint upon which it was issued, I think it is correct that at one time the ancient doctrine of open field was to the effect that if it wasn't involved in the domestic use of the farmer, then it wasn't, it did not violate the 4th Amendment. That was a harsh doctrine because it permitted the

city dweller to have his garage protected against unreasonable search and seizure, but the farmer could not have his barn protected because it was not used for domestic purposes. And, I think the Courts have gotten away from the Hester case, and they started that in the Katz case; and it is really based upon a different principle, as this Court views it, it's not based upon what is curtilage, but where you have a right to reasonably expect the privacy, the right of privacy, and when you read the Olmstead case, the dissent in there by Justice Brandeis on the right of privacy, I think we come to appreciate that what he was saying as to what is one of the most important constitutional rights we have, possibly, is our right of privacy; and this is what so many people are feeling so closely today, with computer systems that can violate all of our rights of privacy, if there aren't some restrictions on it.

In this particular case, looking at the facts that were taken before this Court today, and looking at the affidavit or the complaint made by the Sheriff at the time that he asked for his search warrant, I recognize, and I think all of us that are involved in the Judicial System and justice, do not expect police officers, on the job that they have to do, to be able to sit back and casually or studiously read all of the cases to decide whether or not a search warrant should be issued. They have to take what they got in a hurry and come to the Courts and get a warrant. And, the judge, as indicated here, issued it at 5:00 o'clock, or 6:00 o'clock in the morning, and I am sure he didn't have an opportunity to spend two or three weeks reading cases, so that's why we have the provision in the law that provides that after the search warrant is served that the defendant can come in and file a motion

to quash; and some distance away from the excitement and the immediacy of the action, the Court can look at it and determine whether or not anyone's constitutional rights have been violated.

As this Court read the Complaint for Search Warrant and heard the testimony of Sheriff King, he said that he had information that there had been some purported farm equipment disapeared in Scott County; he searched in all of the highways and couldn't find any farm equipment; he then went to the airways, and while he was in the air, he saw over the defendant's farm equipment; he testified that he could not tell what this, if this equipment was actually the one that was missing, or this equipment that was missing; and even in his affidavit and complaint for search warrant, he stated that he observed a green tractor he believed to be a John Deere Tractor sitting in a feed lot; he also observed a four row John Deere cornhead for a John Deere combine; he said that these were not visible from the public road, but were only visible by the, from the air. Now what does the Sheriff do next? He lands that plane, and I know he landed it before 2:00 A.M., because he saw this in the day light; there was no evidence here that there were spot lights coming out of the plane; but at 2:00 A.M. he goes back to the farm with a deputy to check this out. Now we can call that, and I forgot what counsel termed it, it wasn't a search, but it was an investigation; but a rose is a rose and a rose can not change names. The Sheriff, I am sure, with the deputy didn't go out to this farm at 2:00 A.M. to confirm, he went out to make a search to determine whether or not this equipment was in fact the equipment he was looking for. To get there, as shown by, on Defendant's Exhibit 4, he stopped on the main highway, he crossed

a fence, he crossed another fence, and he was on the property of this defendant. He left a deputy there to watch it, or subsequently had a deputy go out there to watch to see that this property would not be removed. The deputy, Mr. Bryan said that where he was standing to watch this property was close to the residence, about 100 to 125 yards; he further testified that from where he was situated he could see the defendant's house. On this point now, those factual matters would lead this Court to but one conclusion, that this defendant, where this property was believed to be in a place of privacy, that whether you look at it as part of the curtilage, or whether you look at it as part of his right to believe that he intended to have privacy, whichever way you look at it, this Court can only conclude that there was a warrantless search by the police and that the fruit of that warrantless search caused a search warrant to be issued; and there was an unreasonable search and seizure; and, therefore, this Court has no alternative but to grant the Motion to Quash and to Suppress the Evidence which is the fruit of this search; and that will be the ruling of the Court; and the docket entry will include the remarks that this Court has made.